JAN 13 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 541

ANNE VILBERT DE SAIRIGNE,

Petitioner,

vs.

FRANK JAY GOULD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

AND

BRIEF IN SUPPORT THEREOF

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IN THE

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No. .....

ANNE VILBERT DE SAIRIGNE,
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vs.

FRANK JAY GOULD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The Honorable The Chief Justice of the United States and to the Honorable The Associate Justices of the Supreme Court of the United States:

Plaintiff, Anne Vilbert de Sairigne, prays that a writ of certiorari be issued to review a judgment of the United States Court of Appeals for the Second Circuit entered the 22nd day of November, 1949, which "affirmed in open Court" the order and judgment of District Judge ALFRED C. COXE, entered in the Southern District of New York, March 14th, 1949, dismissing the complaint herein.

In support of her petition she respectfully shows as follows:

I. The Opinion and Decisions Below.

The four word decision of the Court of Appeals has not been reported, but is to be found in *New York Law Journal,* Vol. 122, No. 89, November 7, 1949, page 1157, column 6. The opinion of the District Court is reported in 83 F. Supp. 270 and is printed in this record at pages 46-51; Judge COXE's order denying petitioner's motion for reargument is printed at page 45.

II. Jurisdiction.

This is a case involving diversity of citizenship in a suit by an alien on a foreign contract against an American resident here. The judgment of the Court of Appeals was entered November 22, 1949, "ordering, adjudging and decreeing that the judgment of the District Court be affirmed", and its mandate transmitted to and entered in the District Court. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1). The time for presenting this petition expires February 22nd, 1950, under 28 U. S. C. Sec. 2101(c).

III. Question Presented.

This is a case of first impression, in so much as in a diversity case an *alien* invokes the jurisdiction of a United States District Court to sue in contract for damages against an American resident in the Southern District of New York upon a stopped check issued by defendant-appellee to plaintiff-appellant in France and payable at a New York bank in New York City.

(a) We submitted to the Court of Appeals that the recent series of cases decided last May 31st, while our appeal pended, hold that under the doctrine of *forum non conveniens,* there is now permitted by 28 U. S. C. Sec. 1404(a), only a *transfer* within the Federal judicial structure, and not the absolute *dismissal* of any diversity suit, such as was erroneously granted here in both the courts below. See:

Ex Parte Collett, 337 U. S. 55;
Kilpatrick v. *Texas,* 337 U. S. 75;
United States v. *National City Lines,* 337 U. S. 78.

The Court of Appeals could not find that these cases applied, in its summary dismissal of our cause.

(b) In response to a question from the appellate bench, appellee argued, with apparent effectiveness, that under the common law of New York this is not a "commercial contract case", and, so, not necessarily suable in the courts of the state. Thus, further error raised its head in a suggestion, that contrary to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, a federal common law exists different from that found by the state court of the vicinage, particularly under *Terry* v. *Williams* (1938, First Department), 253 App. Div. 890, leave to appeal to the Court of Appeals denied, 254 App. Div. 557.

IV. Summary Statement of Matter Involved.

Since July 1948 (Record, p. 2), appellant has sought a trial on the merits of her claim under a check for $400,000 drawn February 20, 1944 by Frank Jay Gould in France to her order upon the United States Trust Company of New York and payable by the bank at 45 Wall Street in that City; but stopped by Gould there on presentation three years later on February 25, 1947. Baroness de Sairigne, we allege, through the "underground" protected Gould from the Nazis seeking him, and he fixed her services at this value (Record, complaint, pp. 3-5).

At the outset we emphasize that the check was not stopped until nearly two years after the German unconditional surrender of May 1945 and the Nazis had even before then lost military control of France, when Gould could find protection by his own government from any element of coercion, call it by what name you will (Record, pp. 20-21).

Ironic questionings from the appellate bench make surmise that our case was thus colored and obscured, although:

1. No charge of sharp dealing is anywhere alleged in this record. Counsel for Gould have at no time uttered the ugly and shorter or longer word;

2. No answer to our complaint has yet been filed, nor any defense on the merits disclosed;

3. Counsel for the Baroness have fully disclosed the basis of her case in the complaint and affidavits.

We submit, there is no record reason in this case for viewing with alarm or pointing with scorn, nor anything *de hors* the record, which appellant's counsel either know, or even suspect, that would justify their withdrawal from this case! If appellee's counsel can document even a sly dig, they have heretofore *never* openly made, directly or by innuendo, why did they not some place in this record, like Chapman's Homer, "speak out loud and bold"!

If this complaint is defective under its allegations of French and American law, as it has been attacked technically by appellee, no mention of a defect is made in the opinion of the District Court or in the summary decision of the Court of Appeals; *nor have we been permitted to plead over under the liberalized current, or even predecessor practice; instead our cause is dismissed absolutely and withal* (Record, pp. 8-9; p. 34; p. 45).

(a) No issue of proper service or jurisdiction of appellee's person is raised or can be raised at any point; this service was made upon Gould's business agent at 1 Wall Street, where Gould has a business office (Record, pp. 22-23). Gould's counsel states that Gould, "although a citizen of New York is actually physically present in France, where he is sojourning for reasons of health * * *" (Record, p. 10). Gould has a 24 room house at "Ardsley Park", Ardsley-on-the-Hudson, Westchester County, New York, within the Federal Southern Judicial District, with

a public telephone listing in his name for this house; just as his name is publicly listed for his City office at 1 Wall Street, New York City (Record, pp. 38-39). Appellee appeared generally. After his counsel's letter at page 23 of the record, he obviously could not withdraw.

(b) Gould makes no affidavit for this record; nor do the affidavits upon his behalf made by his American counsel *only,* disclose any defenses *on the merits;* only Gould's bad health, *forum non conveniens,* and a claim that *on the face of the complaint,* appellant could not prevail under the conflict of laws are all that are offered before even pleading to our complaint. We have seen bad health urged as reason for an adjournment or a continuance; just as we have experienced the curative balm of amendments to a pleading found insufficient in its technical allegations. Never before have we seen a plaintiff denied entrance to the very threshold of our Courts and the portals closed and locked before her, under such arguments. Nor do we take it, that such arguments were anywhere persuasive below; only *forum non conveniens* seems at all to have swayed the Courts below.

Therefore, we proceed to the nub of the two decisions below: may a District Court in the *exercise of discretion* under the doctrine of *forum non conveniens* or by *vis major dismiss* a suit brought by an alien for damages under a foreign contract, but breached here, against an American citizen resident and domiciled here?

Of course, with the complaint unanswered, and under the affidavits read here on Gould's behalf, no grounds for the exercise of discretion exist at all, if discretion is found persisting in the law of these cases. It seems, to us, apparent, that a defense must be disclosed or allegations made *substantially* that a defense will *sometime and somewhere* be made, before discretion becomes entangled in the

very roots of the case at bar. Even then there could be only transfer to another United States Court, not dismissal with *bon voyage* and *au revoir* as we stop and think of that beautiful town that is seated by the Seine or any other place or country where Gould may "*temporarily* sojourn for his health", or to defend this cause of action.

So we proceed to the statutes conferring jurisdiction.

V. Statutes Involved.

We present ourselves under 28 U. S. C. Sec. 1332(2), where after recital of the familiar amount in controversy the District Courts have original jurisdiction and the action is between:

> "(2) Citizens of a State, and foreign states or citizens or subjects thereof;"

Our venue is laid under 28 U. S. C. Sec. 1391(a):

> "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

Plaintiff-appellant is a French national, resident and domiciled in France (although in New York when suit was started, (record p. 4); whilst defendant-appellee is an American national, resident and domiciled and doing business in the Southern District of New York; but, by his New York counsel's sworn statement is, "physically present in France where he is sojourning for reasons of health * * *" (Record, p. 10).

Under U. S. C. Sec. 1404(a) such a cause may be transferred, but not dismissed, as follows:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may

> transfer any civil action to any other district or division where it might have been brought. • • •"

Gould seeks no transfer "to any other district or division"; nor do we know of any other district where appellee might have brought her action against him; although under U. S. C. Sec. 1391(d), "An alien may be sued in any district."

This action having been begun in the Federal District Court, no power of removal from a state court has ever arisen herein.

Certiorari here is sought under U. S. C. Sec. 1254(1) as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. • • •"

Since judgment was entered in the Court of Appeals on November 22nd, 1949 and its mandate sent to the District Court, appellee has 90 days, or until February 22, 1950 to apply for certiorari herein under 28 U. S. C. Sec. 2101(c):

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, • • •"

We do not at this time seek the solace of the exception that follows this quotation.

No previous application for certiorari or for review here has been made.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Second Circuit, commanding that Honorable Court to certify and send to this Court for review and determination a full and complete transcript of the record of all proceedings of that Court had in this case numbered and entered on its docket as Civil No. 46-738 and No. 21,384, Anne Vilbert de Sairigne, plaintiff-appellant, against Frank Jay Gould, defendant-appellee, to the end that the judgment of that Court may be reviewed and determined by this Court according to the Constitution and laws of the United States and of the State of New York; that the judgments, orders and determinations of the District Court and Court of Appeals be reversed; and for such other and further relief as to this Court may deem just and proper.

Dated, December 8, 1949.

ANNE VILBERT DE SAIRIGNE,
Petitioner

By MARTIN J. KELLY, JR.,
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BRIEF IN SUPPORT OF PETITION

I.

Under the Collett series of decisions of this Court handed down May 31st, 1949, the new transfer provision of Section 1404(a) of the Judicial Code applies to any civil action in the Federal District Courts. Even the dissentients expressing their opinion in the companion *National City Lines* case, resolve all doubts "by reading Section 1404(a) as making the doctrine of *forum non conveniens* applicable to any civil action as to which the venue provisions are codified in revised title 28". The case at bar being a diversity case on contract brought under those venue provisions should have been entertained and not dismissed on jurisdictional or discretionary grounds.

In despite of the *Collett,* the *Kilpatrick* and the *National City Lines* cases decided the same day last May and reported in 337 U. S. 55 et seq., *supra,* the Court of Appeals has affirmed the judgment of the District Court in *dismissing* a suit on a bank check brought by an alien against a citizen resident here. District Judge Coxe was not informed, of course, of the doctrine declared in the *Collett* series of cases, when he decided the case at bar in February 1949. He reached out to the Ninth Circuit for *Heine* v. *N. Y. Life Insurance Co.,* (1931), 50 F. (2d) 382 and relied also upon *Cuba R. R. Co.* v. *Crosby,* (1912), 222 U. S. 473 at 480, a tort case, and also upon some admiralty cases to sustain his exercise of discretion in *dismissing* under *forum non conveniens,* rather than *transferring* the case at bar. Judge Coxe in his opinion refers to the new Judicial Code as "codified", overlooking that the very title of the Act names it as "*Revised,* Codified and Enacted". So, too, does this Court in the *Collett* cases recognize the

new and shining mintage, as contrasted with a mere collection basket of ancient tarnished statutes. The Court of Appeals was informed in a footnote of our main brief, dated June 2, 1949, of the *Collett* series of cases and we fully discussed them in our reply brief. In that series the several District Courts all correctly *transferred* each case and were all *upheld* by this Court. The *Heine* case would now undoubtedly be *transferred* from Oregon to the Southern District of New York. It was never reviewed here. *The Cuba R. R. Co.* case dealt with an *American* citizen plaintiff suing a *New Jersey* corporate defendant on a cause of action arising in Cuba. Admiralty cases *may be sui generis,* so far as we have been presently informed. A hint is found in Mr. Justice BRANDEIS' notes under *Canada Malting Co.* v. *Paterson Steamships Ltd.* (1932), 285 U. S. 413, 421-2. The Court of Appeals and the District Court were each informed in our main briefs of the historical background of the *Revision* and Codification that became Title 28, § 1404(a) of the Judicial Code. Appellee found the best argumentative approach to the *Collett* series to be a three line reference to them at page 19 of his main brief of 35 pages. We thought we had answered all, when we partly coined, in reliance on the *Collett* cases, a Latin tag:

"Washingtonum locutum est; causa finita est."

We sympathetically understand why appellee should almost ignore the *Collett* cases; for why should he rush in where angels fear to tread? Yet when we finally ascended to the bar of the intermediate appellate bench, we were distressed and cast down by the judgment of an *ex cathedra* summary utterance—"the cases do not apply." We seek *here* an infallible pronouncement from this haven of last resort.

Although, it is true that none of the plaintiffs in the *Collett* and its two companion cases was an alien, yet, Mr. Chief Justice VINSON refers to "any civil action" as controlled by the new transfer provisions; he also refers to § 1391 for the venue provisions under which first we approached the Courts and came into disaster. He further states in the *National City Lines* case, "Obviously an example is not a complete catalogue" (p. 81). We most respectfully submit, that this Honorable Court was not suffering from invincible ignorance by overlooking or forgetting that suits by and against aliens provided for by the very venue provisions of the new Judicial Code it cites in those opinions, might and should be added to the "examples" actually adjudicated in the *Collett* cases.

Either we have misread the *Collett* cases, or we have not; therefore, we shall not trouble the Court with further examination of the principles it has so lately enunciated.

We turn now to a secondary issue dealing with the common law of New York; secondary, we say, because if the *Collett* cases hold what we believe them to hold, we should be permitted to go to trail under the Revision of the Judicial Code, without the added help of the principle of *Erie R. Co.* v. *Tompkins,* we shall now discuss.

II.

The Courts of New York will entertain foreign contract cases for damages, whilst refusing in discretion to entertain foreign tort claims. Equity cases, derivative and stockholders suits, claims against decedents estates and others are treated under different principles. The Courts below have violated the principle of *Erie R. Co.* v. *Tompkins* by ignoring New York common law in a diversity case.

Although the venue of actions is fixed by our Civil Practice Act and has had statutory sanction since at least

the first Field codes; nonetheless the Courts of New York by interpretation have worked out a "common law" in refusing or accepting cases between non-residents arising in other jurisdictions.

Furbush v. *Nye* (1897, First Dept.), 17 App. Div. 325;
Wertheim v. *Clergue* (1909, First Dept.), 53 App. Div. 122;
Holzer v. *Deutsche - Reichsban - Gesellschaft* (1938), 277 N. 474 at 478;
Hutchinson v. *Ward* (1908), 192 N. Y. 375.

Forum non conveniens is certainly an adaptation since it left the land north of the Tweed and descended upon us. In American acceptance, it is, say writers an innovation, or "judge made", or a form of "common law". Mr. Paxton Blair, later Mr. Justice Blair of the Supreme Court of the State of New York, who first gave the term wide currency in his legal article, *Forum Non Conveniens in Anglo-American Law, 29 Columbia Law Review 1-34,* January 1929, explains the rationale of the decisions in New York. See also the recent opinion of Mr. Presiding Justice Peck of the Supreme Court, Appellate Division, First Department in *Rothstein* v. *Rothstein* (1947), 272 App. Div. 26, 27-28, affd. without opinion, 297 N. Y. 705 and the opinion of the First Department in *Fitzgerald* v. *Niles, Bement Pond Co.* (Dec. 1948), 274 App. Div. 499. The latter was an equity action under a collective bargaining contract. It was left to Connecticut, the home of the *Danbury Hatters* cases; but, if it had been an action for simple damages under the contract, the Court in its opinion does not indicate it would have been rejected as "non-commercial", "sociological", "political", "economic" or "blood, sweat and tears." See also the report of *Logan* v. *Bank of Scotland* (1906), 1 K. B. 141, where Sir Rufus

Isaacs, afterwards Lord Chief Justice READING, as counsel, cites some of the New York cases.

Without exhausting, in an application for certiorari, the legal literature on the subject, we flatly declare that there is no authority sustaining the statement made by appellee's counsel to the United States Court of Appeals in the case at bar to the effect that New York common law accepts foreign contract cases *only* when they are of a *commercial nature.*

The decisive legal battle for his proposition was fought and lost in *Terry* v. *Williams* (1938, 4th Case, First Department), 253 App. Div. 890. Defendant's counsel there, we trust, exhausted every possible means of escaping the jurisdiction of the New York Courts in a suit on an *accommodation personal* loan. Williams was a New Jersey resident served with New York Supreme Court process in New York City while there about his duties as a federal officer at the offices of the Federal Emergency Administration of Public Works in the Port Authority Building. The record of that case shows at pages 14-15, folios 42-44, that the owner loaned Williams, the defendant, 100 shares of stock of Dixie Drinking Cup, Incorporated, for Williams' "accommodation" and without consideration. These were pledged as collateral by Williams for a bank loan and the bank foreclosed on the shares. The owner, a New Jersey resident, assigned his claim to a Massachusetts resident, Terry, who began the suit. Williams attempted to escape the jurisdiction of the New York courts under the claims: of immunity as a Federal officer; that the bank was liable; that all the transactions occurred in New Jersey; that all the witnesses and documents were there and that he could only there produce his defenses. Mr. Justice JOHN E. MCGEEHAN held the case at Special Term for trial in the proper part of the New York Supreme Court. The defendant-appellant's case was as elaborately briefed as the case

at bar was below. The Appellate Division had so little doubt, that it affirmed without opinion and denied motions for a reargument and for leave to appeal to the Court of Appeals in 254 App. Div. 557. Summary judgment against Williams was granted by Mr. Justice LAUER at Special Term; this judgment was reversed (Feb. 1939, 6th case) 256 App. Div. 905 on the ground a triable issue of fact existed; the case was afterwards settled.

How many other foreign contract cases of what appellee's counsel calls "a non-commercial nature" are tried yearly in New York, we cannot inform ourselves; but we venture the opinion that never since *Terry* v. *Williams* has there been a successful attempt to escape jurisdiction under the argument made by appellee's counsel in the case at bar. Plaintiffs have failed only when they have attempted to foist "non-commercial" or even "commercial" cases on the courts of New York, *regardless of the relief sought,* as in *Rothstein* v. *Rothstein,* 272 App. Div. 26, *supra.* Damages for breach of contracts call for money payment whether the transaction originated in the marketplace or elsewhere.

The only possible foundation for appellee's argument is that the rationale of the New York decisions has been explained upon the ground that the "commercial supremacy" of that state makes hospitality towards foreign suits and suitors desirable in suits for damages for breach of contract; whilst large verdicts in tort cases should not encourage litigants to come here. When the distinction between commercial and non-commercial *contract* cases was valiantly pressed for decision in *Terry* v. *Williams,* the First Department, where the rule originated, found the claim so bare of merit that it would not even write an opinion or permit further inquiry in the Court of last resort.

What a paradox it would have been, if Williams in that case had removed to the District Court of the Southern

District of New York and it had been found that there was one New York law in the Court House at Foley Square *South,* but a different one in the Court House next door, at Foley Square *North!* Mr. Justice FRANKFURTER in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, interpreting *Erie R.* v. *Tompkins,* 304 U. S. 64, says this Court will have none of that.

After the preparation of these papers, *de la Bouillerie* v. *de Vienne* (Nov. 23, 1949, Official Advance Sheets, Dec. 24, 1949, No. 556), 300 N. Y. 60, is reported. That case is an action for false arrest in France of a French National by defendants now resident in New York under First Citizenship Papers. Chief Judge LOUGHRAN in reversing for an unanimous Court tersely finally commanded in preliminarily beginning, "there was here error of law":

> "Our courts are bound to try an action for a foreign tort when either plaintiff or defendant is a resident of this State" (p. 62).

Only when neither party is a resident, do we wander in that twilight zone where appellee led the Courts below so mournfully astray.

Further argument may be found in our briefs below; but, we respectfully submit that what we now present should be sufficient upon this application of limited scope.

The New York law having been so dazzlingly illuminated, since we, in our obscurity, sought to enlighten the Courts below, we respectfully request, by authority of *Michalelk* v. *United States Gypsum Co.* (1936), 298 U. S. 639 (memo), and many other rules and precedents, to add under our prayer for relief.

The writ of certiorari as prayed for should be granted; and that this Honorable Court also reverse.

Dated, New York, N. Y., 70 Pine Street, January 3, 1950.

Respectfully submitted,

MARTIN J. KELLY, JR.,
Counsel for Petitioner and Plaintiff-Appellant.

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Petitioner,

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FRANK JAY GOULD,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 541.

ANNE VILBERT DE SAIRIGNE,

Petitioner,

against

FRANK JAY GOULD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York (Hon. Alfred C. Coxe, D. J.) is reported in 83 F. Supp. 270. Judgment thereon was entered March 16, 1949.

The Court of Appeals for the Second Circuit (L. Hand, C. J., Swan and Frank, JJ.) affirmed the decision of the District Court in open court at the conclusion of the oral argument. While there is no reported opinion, the decision of the Court of Appeals is reported at 177 F. 2d 515 (2d Cir. 1949) as follows:

> "PER CURIAM. Judgment affirmed, 83 F. Supp. 270, in open court."

Judgment was entered November 4, 1949.

Jurisdiction.

Jurisdiction is invoked by petitioner to review the order below under 28 U. S. C. §1254(1).

Statement of the Case.

The petition for certiorari submitted to this Court fails to contain any statement of this case, nor does it indicate the unique quality of petitioner's alleged causes of action. As permitted by Rule 27(4) of this Court, respondent's brief hereinbelow presents such statement.

The Complaint—The complaint, which alleges three causes of action, originally demanded judgment against the United States Trust Company of New York, in addition to the instant respondent, Frank Jay Gould. The third alleged cause of action (R. 6-7) related to the alleged claim against the Trust Company. That cause of action is of no importance herein, the defendant having been dismissed by order of the United States District Court for the Southern District of New York (Hon. John W. Clancy, D. J.) on December 6, 1948 and no appeal having been taken from such dismissal.

The first cause of action (R. 2-4) alleged that plaintiff (the instant petitioner) was a citizen of France; that defendant Gould was a citizen of the State of New York and the United States of America presently residing in France but having a business office in New York; that about February 20, 1944 defendant Gould in France delivered to plaintiff his check for $400,000 drawn on defendant Trust Company; that payment was refused by the Trust Company when the endorsed check was presented; and that "under the laws of France, where said check was made and delivered, the same constituted an undertaking or agreement

or admission between the parties • • • which took the place of and superseded any prior arrangement or agreement" and that, "by reason thereof, *under the laws of France, the defendant, Frank Jay Gould became obligated to pay* • • • *regardless of any prior agreement between the said parties, and that said obligation became binding in law even if the making and delivery of said check were a gratuitous payment or gift or intended as a gift.*" (Italics supplied.)

The second cause of action (R. 4-6) contained allegations similar to that of the first, but added thereto that defendant was, while residing in France, apprehensive of arrest by the German Occupation Armies and that plaintiff at Gould's instance and request gave him "shelter, asylum, comfort and protection in her home"; that Gould, "a man possessed of great wealth whose annual income was • • • in excess of Five hundred thousand ($500,000.00) dollars" informed plaintiff that he valued her services at $400,000 and agreed to pay such sum to plaintiff and gave her the check for $400,000 in discharge of such agreement; and that Gould, without justification, stopped payment on the check. This cause of action repeats verbatim the allegations of the first cause of action that "by reason thereof, *under the laws of France, the defendant, Frank Jay Gould became obligated to pay* • • • *regardless of any prior agreement between the said parties, and that said obligation became binding in law even if the making and delivery of said check were a gratuitous payment or gift or intended as a gift.*" (Italics supplied.)

In oral argument before the federal District Court, petitioner's attorney stressed this unique nature of both alleged causes of action, repeating that petitioner's claim was not, under either cause of action, premised on any doctrine of consideration, and that both causes looked to the *un-*

specified provisions of French law pursuant to which a check given gratuitously created a legally enforceable obligation, even though intended as a gift.

The Facts—On November 1, 1948, respondent Frank Jay Gould appeared generally in this action in the District Court for the Southern District of New York through his attorneys though neither he nor any authorized agent of his had been served with a copy of the summons or complaint (R. 23).

By order to show cause dated December 4, 1948, the instant respondent moved to dismiss the complaint on the grounds that an inconvenient forum had been chosen and that the complaint failed to state a claim* (R. 8-9).

This motion was granted "in all respects" by the District Court (R. 35). Reargument was denied (R. 45), and the Court of Appeals affirmed. It is this affirmance which petitioner here asks reviewed.

That petitioner is a citizen of France actually resident therein who has never resided in the United States is undisputed. The only occasions on which she has ever been in the United States have been visits of a highly temporary nature (R. 10).

It is equally undisputed that the alleged transactions upon which plaintiff predicates her claim took place, if they took place at all, in France (R. 3, 4-5).

Petitioner's claim purports to be predicated wholly and solely upon the law of France (R. 3-4, 5-6).

Respondent has, according to the petitioner's own papers, "resided in France almost continuously since 1913"

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* Neither in the opinion of the District Court nor in the colloquy before the Circuit Court was it found necessary to discuss the sufficiency of the complaint. The complaint was attacked below in respondent's briefs because of its complete failure to adequately allege the foreign law upon which it relies.

(R. 6). For reasons of his health he is unable presently to leave France (R. 10, 32, 44). Furthermore, respondent has extensive French holdings more than sufficient to satisfy any judgment which might there be rendered against him (R. 10-11, 16, 29), and is amenable to process in France (R. 10-11, 16, 33-34).

No sound reason for bringing this action in this country, rather than in France, has ever been indicated throughout the course of this action (R. 19, 32-33).

The District Court's Opinion—In dismissing the complaint herein on the ground that the forum chosen by the petitioner was an inconvenient one the District Court pointed out that the rights claimed in the complaint were alleged to exist, not under the laws of the United States nor any state thereof, but under the laws of France which laws were "quite different from, and inconsistent with, our laws" (R. 48).

The District Court noted that not only were aliens without any constitutional right to sue in the federal court, but that where relationships were entered into abroad and under foreign laws, wise judicial discretion would remit the parties to the place where the relationships arose, thus avoiding problems both in the conflict of laws and in the ascertainment of foreign law (R. 49-50).

The District Court disposed of the contention that Section 1404(a) of the New Judicial Code stripped the Court of its inherent power to deny jurisdiction as "plainly unsound" and unsupported by logic or by the language or history of the statute (R. 50-51).

The District Court stated further that New York Law did not govern (R. 51).

The Court of Appeals for the Second Circuit, in its colloquy with counsel during the oral argument and by its

decisive action in, without written opinion, affirming the judgment below in open court, emphatically showed its approval of the District Court's action.

Summary of Argument.

I. The petition should be denied, not alone because it is lacking in accuracy, brevity and clearness, but because no principles are presented the settlement of which is important to the public.

II. The action of the Circuit Court in affirming dismissal on grounds of *forum non conveniens* is in no way inconsistent with decisions of this Court.

III. The federal doctrine of *forum non conveniens* was properly applied and no error was made in interpreting local law.

ARGUMENT.

I.

The petition should be denied, not alone because it is lacking in accuracy, brevity and clearness, but because no principles are presented the settlement of which is important to the public.

The "Questions Presented" section of the petition as amplified by the petition's "Summary Statement of Matter Involved" may, generously construed, be read as supplying the "reasons relied on for the allowance of the writ" as is required by Rule 38(2) of this Court.

It is not, however, quite clear what the "reasons" are which petitioner relies upon.

The first "Question" insists that the Circuit Court's decision in affirming dismissal under *forum non conveniens* doctrine is in conflict with applicable decisions of this Court. The second "Question" seems to include two alleged "reasons"—both that the failure of the Circuit Court to look to State law was in conflict with this Court's decision in *Erie R. Co.* v. *Tompkins*, and that a question of local law has been decided in a way probably in conflict with applicable local decisions. The petition's "Summary Statement of Matter Involved" may possibly indicate a still further alleged error, an abuse of discretion by the courts below in the instant case, but this charge is not amplified nor is it supported by the citation of authorities of this or lower courts.

This much respondent's attorneys are able to cull from a careful reading of the petition. But respondent's attorneys, who have represented respondent since the instigation of this action (R. 23), are completely mystified by much of the material found in the petitioning papers.

Two things are clear, however, about the petition:

(1) The petition does not "present with studied accuracy, brevity and clearness" the grounds on which the petition for certiorari allegedly should be granted. This Court stressed this need for "accuracy, brevity, and clearness" in *Furness, Withy & Co.* v. *Yang-tsze Insurance Ass'n*, 242 U. S. 430, 434 (1917), and in *Southern Power Company* v. *North Carolina Public Service Co.*, 263 U. S. 508, 509 (1924). This petition, therefore, in its present form is an imposition on this Court and should not be entertained.

(2) The petitioner's papers do not advance a single argument, nor does any exist, which may indicate

why or how the review which petitioner here seeks may settle principles which are of importance to the public at large as distinguished from the parties now before this Court. Absent such principles, ordinarily this Court will not grant writs of certiorari. See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387, 392-93 (1923); cf. *United States* v. *Rimer*, 220 U. S. 547 (1911).

Hence as the petitioner has failed to support his petition with any arguments of public interest, and as the petition is lacking in "accuracy, brevity and clearness," the petition should be denied.

II.

The action of the Circuit Court in affirming dismissal on grounds of *forum non conveniens* is in no way inconsistent with decisions of this Court.

Petitioner contends here, as he did without avail below, that Section 1404(a) of the New Judicial Code now compels the federal courts to retain his action—unique as it is in theory, based on alleged French law and between French residents, and allegedly stemming from actions which took place in France—though this action, if bona fide, could readily be the subject of a law suit in France where respondent is amenable to service and judgment.

Despite petitioner's contention, the irrelevancy of Section 1404(a) to this case appears clearly from all possible lines of authority—from the language of that Section, from that Section's legislative history and purpose, from the case law which has arisen under it, and from the commentaries of legal writers.

Nothing this Court has said gives any contrary indication.

The District Court, in dismissing this action, said that petitioner's contention that Section 1404(a) barred dismissal of this action was "plainly unsound" (R. 50).

The action of the Court of Appeals for the Second Circuit (L. Hand, C. J., Swan and Frank, JJ.) in affirming from the bench the action of the District Court was premised on arguments drawn from all these lines of authority, and it is amply justified by these authorities.

The Section in question, Section 1404(a) of the New Judicial Code (28 U. S. C. §1404(a)), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The *language* of this Section provides only for the transfer of civil actions which might have been brought in other districts. There is no other district in which the instant action might have been brought. *Ergo,* this statute is completely without application.

The *legislative history and purpose* of this Section also show the petitioner's contention to be without merit. Petitioner's papers fail to indicate a single item in the legislative history of the Section which shows any intent to apply the Section to bar dismissals where the only proper forum is in a foreign land. On the contrary, in the very cases so heavily relied upon by petitioner, this Court indicated that the purpose of Section 1404(a)—as revealed in the history of that section—was in fact to prevent those impositions on the jurisdiction of federal courts which had previously been made under the protection of the special venue provisions

of certain federal statutes. See *Ex parte Collett*, 337 U. S. 55, 60-61, 71 (1949); *Kilpatrick* v. *Texas & Pacific R. Co.*, 337 U. S. 75, 77-78 (1949); *United States* v. *National City Lines*, 337 U. S. 78, 81-82 (1949); see also Reviser's Notes, *Title 28, U. S. Code Congressional Service* 1853 (1948). No such venue provisions are here involved.

The *case law*, especially the three cases (above cited) so heavily relied upon by petitioner, shows clearly that Section 1404(a) has had the effect of broadening, not narrowing, the field of application of the *forum non conveniens* doctrine by permitting any of the federal district courts to refuse to try any action the trial of which would be accompanied by considerable inconvenience, even though such court would formerly have had to retain such action.*

None of the three cases so heavily relied upon by petitioner holds that the doctrine of *forum non conveniens* is henceforth to be limited in federal courts to cases in which two or more federal districts are available. Nor is there any dictum of this Court or any of its members in the opinions in these cases to indicate that such is the effect to be given Section 1404(a).

The Court of Appeals for the Second Circuit and the District Court for the Southern District of New York are not alone in their affirmative determination that the pre-1948 doctrine of *forum non conveniens* is still very much a part of our federal law. In the Third Circuit, in *Cinema Amusements, Inc.* v. *Loew's, Inc.*, 85 F. Supp. 319, 322 (D. Del. 1949), District Judge Rodney stated that:

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*Though Section 1404(a) has thus broadened the *forum non conveniens* concept of discretionary refusal to exercise jurisdiction because of inconvenience which would attend were jurisdiction afforded, it provides a different and less drastic remedy—transfer rather than dismissal—in certain cases in which such transfer is feasible.

> "*Forum non conveniens* still exists independently from Section 1404(a), at least in connection with those cases instituted in federal courts when the more convenient forum is in a foreign jurisdiction."

To hold, as petitioner asks, that Section 1404(a) was intended to completely replace the older doctrine of *forum non conveniens* would lead to an absurd result. It seems clear that Section 1404(a) applies in admiralty. See *Untersinger* v. *United States*, 172 F. 2d 298, 301 (2d Cir. 1949); *Moore's Commentary on the U. S. Judicial Code* 207 (1949). Hence, if petitioner has his way, courts of admiralty might lose their long established discretionary power to refuse jurisdiction in cases where a foreign forum was more convenient.

The *commentaries of legal writers* on Section 1404(a) directly oppose petitioner's contention that this Section applies to bar dismissal in the instant case. Prior to the enactment of this Section it was anticipated that the new provision "would not apply to cases involving a foreign cause of action." See *Note*, 56 Yale L. J. 1234, 1249 (1947). Furthermore the doctrine of *forum non conveniens* was well established in our decisional law prior to the enactment of Section 1404(a). See Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908 (1947); Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1 (1929). And there is no indication that Section 1404(a) was intended to excise from federal law this doctrine so well established.

Petitioner's contention that the action of the Court of Appeals for the Second Circuit conflicts with this Court's decisions in the *Collett* series of cases could not, as the action of the courts below and the arguments above indicate, possibly be more completely without merit. No seri-

ous question of law is raised which might serve as a basis on which this Court might grant certiorari.

Nor have the Courts below—as petitioner may seem to suggest—erred in the exercise of their discretion.

In a leading case on *forum non conveniens,* this Court recognized the broad area for the exercise of discretion in dismissing on grounds of *forum non conveniens.* See *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 512 (1947). See also *Universal Adjustment Corporation* v. *Midland Bank, Ltd.,* 281 Mass. 303, 316, 184 N. E. 152, 159 (1933) [Rugg, C. J.].

Should this Court deem the instant petition to have raised any question of abuse of discretion, respondent, in opposing the petition, is content to rest on the opinion of the District Court (R. 46-51) which fully explains the sound grounds on which the district judge exercised his discretion and dismissed.

III.

The federal doctrine of *forum non conveniens* was properly applied and no error was made in interpreting local law.

As has been indicated, the second of the petition's "Questions Presented" confuses two separate questions of law. It will be assumed herein that petitioner intended to raise both of them.

A. The Courts Below Properly Looked to and Applied the Federal Doctrine of *Forum Non Conveniens.*

Petitioner places reliance on the rule in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), to urge that the federal courts cannot dismiss her essentially foreign and unique causes of action involving persons residing abroad, because

—allegedly—the complaint could not have been so dismissed by the state courts.

This Court has never expressly ruled on the applicability of the *Erie* doctrine to *forum non conveniens* question. But, though the doctrine of *forum non conveniens* was not before this Court in the case of *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 106 (1945), this Court there said:

> "State law cannot define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is available as an alternative tribunal to the State's courts."

This may be some indication of this Court's views as to the propriety of federal court application of federal *forum non conveniens* doctrine in declining the exercise of jurisdiction in diversity cases.

The *Erie* rule, analyzed in the light of its purpose, clearly does not prevent federal courts from dismissing diversity actions on the grounds of *forum non conveniens* in states in which the state courts could not likewise decline jurisdiction.

The *Erie* rule was intended to prevent discrimination against local citizens in favor of non-residents which had come about as a result of *Swift* v. *Tyson,* 16 Pet. 1 (U. S. 1842). This Court stated in *Woods* v. *Interstate Realty Co.,* 337 U. S. 535, 538 (1949), that a rule contrary to that of the *Erie* case would:

> "• • • create discriminations against citizens of the State in favor of those authorized to invoke the diversity jurisdiction of the federal courts. It was that element of discrimination that *Erie R. Co.* v. *Tompkins* was designed to eliminate."

The *Woods* case, *supra,* is one of the several recent decisions in which this Court held that the federal courts had

to apply state law to matters which, like *forum non conveniens*, might seem "procedural" were mechanical classifications utilized.* But these were all cases in which plaintiffs sought to utilize federal diversity jurisdiction to *avoid* state rules which would have deprived them of a remedy. In each such case this Court, to prevent the kind of discrimination referred to in the *Woods* case, held the *Erie* rule governing.

In the instant case petitioner has not seized on the availability of diversity jurisdiction to avoid the state *forum non conveniens* doctrine. Petitioner asserts that he would be entitled to sue in the state courts and claims, therefore, that the federal courts must grant similar relief. But the above authorities indicate that this contention cannot successfully look to the *Erie* rule for authority.

The case of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), lends further support to the conclusion that the courts below, in looking to federal law and dismissing on grounds of *forum non conveniens*, did not offend against the *Erie* rule. This Court in that case referred to the provisions of Rule 23 of the Federal Rules of Civil Procedure which bars stockholders' actions in the federal courts by plaintiffs who were not stockholders at the time of the transactions of which they complain. This Court there said that this rule—pursuant to which a federal court "will not permit itself to be used," and will decline juris-

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* *Ragan* v. *Merchants Transfer & W. Co.*, 337 U. S. 530 (1949)—Tort action barred in federal court when summons served after state statute of limitations had run; *Woods* v. *Interstate Realty Co.*, *supra*—Contract action barred in federal court where the plaintiff had been doing business in the district in which the federal court was situated without qualifying under state law and where, therefore, the contract was unenforcible in the state court; *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949)—Shareholder's derivative action barred in a federal court until plaintiff post bond as was required to institute action in state courts.

diction in certain cases—"may be observed by a federal court, even if not applicable in state court." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* at 556.

It is inconceivable that any different analysis could be applied to the doctrine of *forum non conveniens* which is also an instance in which the federal court "will not permit itself to be used", even though the reasons that cause it to refuse are "not applicable in state court".

That federal *forum non conveniens* doctrine is or should be applied by federal courts in diversity cases is strongly and clearly urged in *Moore's Commentary on the U. S. Judicial Code* 201, 331 (1949) where it is stated that *forum non conveniens* is a "facet of venue", and

> "Because of that, because the doctrine affects the trial convenience of the federal courts and their dockets, and because of the mobility of the federal judiciary on a national scale, they should be independent of state doctrines of forum non conveniens, fashioned for courts operating on a state scale. Forum non conveniens is procedural and the new Code so treats it" (p. 331).

See also Braucher, *The Inconvenient Federal Forum,* 60 Harv. L. Rev. 908, 928 (1947).

It is thus clear that the District Court's dismissal of the instant unique action on grounds of *forum non conveniens* was not in violation of the *Erie* doctrine, and that the action of the Court of Appeals for the Second Circuit in affirming the dismissal below was proper.

B. Had the Present Action Been Brought in a New York Court Such Court Would Have Had Discretion to Dismiss.

As the Circuit Court's affirmance of the dismissal can rest soundly on the propriety of the application of federal

forum non conveniens doctrine, the question of local law—and any possible error in its determination—need not be considered by this Court in denying the petition. But in answer to the petition's suggestion that the Court of Appeals for the Second Circuit decided a question of local law—the applicability of the doctrine of *forum non conveniens* to cases of this kind—in a way probably in conflict with local decisions, this contention will be briefly analyzed.

Though there is a general rule that the courts of New York have no discretion to dismiss actions arising out of commercial transactions wherever they took place, *Wertheim* v. *Clergue*, 53 App. Div. 122, 125-6, 65 N. Y. Supp. 750, 753 (1st Dept. 1900), this rule is not without exceptions. In *Marshall* v. *Sherman*, 148 N. Y. 9, 42 N. E. 419 (1895), where the alleged cause of action was of a type not recognized in New York, the New York Court of Appeals ordered the dismissal of an action brought against New York residents*, though the alleged cause of action arose out of commercial relationships. See also *Gregonis* v. *Philadelphia & Reading C. & I. Co.*, 235 N. Y. 152, 161, 139 N. E. 223, 226 (1923); *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, 105, 175 N. E. 529, 530 (1931).

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* Similarly the federal courts have not held that local ties provided by technical concepts of domicile, citizenship and "doing business" bar application of the doctrine of *forum non conveniens*. This Court has indicated dismissal is proper though defendants are qualified to do business in the dismissing forum. See *Gulf Oil Corp.* v. *Gilbert, supra; Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518 (1947). Nor is citizenship a factor to be considered on a motion involving *forum non conveniens*. *Douglas* v. *New York, N. H. & H. R.R. Co.*, 279 U. S. 377, 385-87 (1929); *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698, 704 (1942). In *Makela* v. *Wilson Transit Co.*, D. Del., Feb. 17, 1949, an action was transferred—on *forum non conveniens* grounds—away from the domicile of the defendant.

Were petitioner's claim of a commercial nature, as it is premised on laws which are "quite different from, and inconsistent with, our laws" (R. 48), it might well be found to be within that group of commercial claims over which the New York Courts will not feel compelled to exercise their jurisdiction.

But the instant complaint is not based on claims of a commercial nature. Both causes of action allegedly exist solely because of respondent's check which, though "a gratuitous payment or gift or intended as a gift" allegedly creates a binding obligation under French law. This is stated in the complaint (R. 4, 6) and was affirmed by petitioner's counsel in the District Court. Such alleged causes of action are certainly not "commercial" in nature, nor do they seem "contractual" as that term is used in our law.

But should petitioner's causes of action be liberally regarded as contractual in nature, respondent notes that the New York courts wrote no opinion in *Terry* v. *Williams*, 253 App. Div. 890 (1st Dept. 1938), so heavily relied upon by petitioner in support of his argument that New York courts lack discretion to dismiss such actions. The record in that case, as elucidated in petitioner's brief (p. 13), indicates that the contract there involved, unlike that in the instant case, well might be deemed to be of a commercial nature. Moreover, petitioner's statement that "the distinction between commercial and non-commercial *contract* cases was valiantly pressed" has, in a thorough search of the record of that case, been found to be completely without support.

Hence existing New York authority indicates that the state courts have discretion to dismiss actions analogous to the instant one.

The language of the New York Court of Appeals in the tort action of *de la Bouillerie* v. *de Vienne*, 300 N. Y. 60, 89 N. E. 2d 15 (1949), cited in petitioner's brief (p. 15), should be read in the light of the facts of that case, which are clearly distinguishable from ours. There the defendants were physically present in the United States, where they had taken out their first citizenship papers and were presumably remaining for the purpose of acquiring United States citizenship, and process was served upon them personally in the State of New York. Incidentally one of the defendants held a license from the United States Treasury decontrolling her funds in this country. The fair inference is that the defendants could not have been readily served outside the State of New York. By contrast, in the instant case, as appears from the Record (R. 44):

> "Finally, plaintiff's counsel specifically admits that the defendant Frank Jay Gould is presently sojourning in France. He does not deny that Gould is there for purposes of his health; that the condition of his health is such that his doctors advise it will be impossible for him to journey to New York in the foreseeable future; and that he has been sojourning in France for many years. Nor does the plaintiff deny that she can obtain jurisdiction over Gould in France and that there he is possessed of more than sufficient assets to satisfy any judgment she might obtain."

Furthermore, there may soundly be a different state rule as to dismissal on grounds of inconvenience in cases where parties willingly enter into the relationship which allegedly gave rise to their cause of action, and in cases like the tort action of *de la Bouillerie* v. *de Vienne, supra*, where that is not so. As Mr. Justice Holmes noted in *Cuba R.R. Co.* v. *Crosby*, 222 U. S. 473, 480 (1912):

> "• • • it should be remembered that parties do not enter into civil relations in foreign jurisdictions in reliance upon our courts. They could not complain if our courts refused to meddle with their affairs and remitted them to the place that established and would enforce their rights."

As the action of the Circuit Court does not conflict with local decisions, this alleged basis for certiorari too must fail.

Conclusion.

We respectfully submit that the petition is improper in form because of its lack of clarity, and that it not only presents no questions of public interest but that it fails to show any possible error of law in the decision of the Court of Appeals for the Second Circuit.

The writ of certiorari sought by the petitioner should not, therefore, be issued.

Respectfully submitted,

JOHN T. CAHILL,
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CHARLES CLARK AUSTIN,
Attorneys for Respondent.

February 15, 1950.